

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH JAMES WEST,

Petitioner,

v.

ATTORNEY GENERAL OF THE STATE
OF CALIFORNIA,

Respondent.

Case No. 1:22-cv-00172-ADA-CDB (HC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS GRANTING
RESPONDENT'S MOTION TO DISMISS AND
DISMISSING WITHOUT PREJUDICE
PETITIONER'S FIRST AMENDED PETITION
FOR WRIT OF HABEAS CORPUS

(ECF Nos. 19, 27)

Petitioner Kenneth James West is a state prisoner proceeding pro se with a petition for habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.) The matter was assigned to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On March 15, 2022, Petitioner filed a first amended petition for writ of habeas corpus. (ECF No. 14.) On July 22, 2022, Respondent filed a motion to dismiss Petitioner's first amended petition. (ECF No. 19.) On August 11, 2022, Petitioner filed a response. (ECF No. 22.) On November 30, 2022, the assigned Magistrate Judge found that "Petitioner's federal petition for writ of habeas corpus is deficient for advancing claims that are wholly unexhausted and for asserting an exhausted claim that is not sufficiently pled." (ECF No. 27 at 6.) The Magistrate Judge recommended Petitioner's first amended petition be dismissed without prejudice and Petitioner be provided an opportunity to file a second amended petition. (*Id.*)

On December 19, 2022, Petitioner filed objections to the Magistrate Judge’s findings and recommendations. (ECF No. 28.) Petitioner asserts all his state remedies have been exhausted and attaches a copy of the Supreme Court of California’s denial of his petition for review. (*Id.*) In addition, Petitioner restates the same arguments he advanced in his opposition to Respondent’s motion to dismiss for his claim of ineffective assistance of counsel. (*Id.*; *see* ECF Nos. 14, 22.) These arguments are unavailing. The Court agrees with the Magistrate Judge that Petitioner has exhausted one claim that he presented to the state court – ineffective assistance of counsel for failing to object at sentencing. (*See* ECF No. 20-2 at 3; ECF No. 20-6 at 2.) The fact that Petitioner has exhausted some claims, however, does not mean that any other claim he may have – like the Eighth and Fourteenth Amendment claims he presents in his petition – are now ripe for review in federal court. Additionally, the Court agrees with the Magistrate Judge that Petitioner has not pleaded his one exhausted claim with sufficient specificity. Petitioner states that his counsel “refused to object to sentence or restitution imposed,” but he does not explain the factual circumstances that suggested the need to make such an objection at sentencing. The Magistrate Judge has appropriately suggested dismissing the petition without prejudice so that Petitioner can amend the petition, and, if desired, request a stay of the petition in this court in order to exhaust claims in state court.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, the Court has conducted a de novo review of this case. Having carefully reviewed the entire matter, the Court concludes the findings and recommendations are supported by the record and by proper analysis.

Accordingly,

1. The findings and recommendations issued on November 30, 2022, (ECF No. 27), are adopted in full;
2. Respondent’s motion to dismiss, (ECF No. 19), is granted;
3. Petitioner’s first amended petition for writ of habeas corpus is dismissed without prejudice for failure to show exhaustion of state remedies and failure to state a cognizable federal claim;

- 1 4. Petitioner shall be provided **thirty (30) days** from the date of service of this order
2 to file a second amended petition with claims that are fully exhausted and
3 sufficiently pleaded.

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6 IT IS SO ORDERED.

7 Dated: March 7, 2023


UNITED STATES DISTRICT JUDGE